DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
825 North Capitol Street, NE, Suite 4150
Washington, DC 20002-4210

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. KATIA ZACAPA-MILLS Respondent	Case No.: DH-I-07-D100331

FINAL ORDER

I. Introduction

This case arises under the Civil Infractions Act of 1985, as amended (D.C. Official Code §§ 2-1801.01 - 1802.05) and Title 29, Chapter 3 of the District of Columbia Municipal Regulations ("DCMR"), which governs child development facilities. By Notice of Infraction (the "NOI") served on July 27, 2007, the Government charged Respondent, Katia Zacapa-Mills with violating 29 DCMR 301.1 for operating a child development home without a license authorizing that kind of operation (five children admitted, but licensed for four); 29 DCMR 327.1 for failure to comply with applicable zoning regulations, i.e. operating outside her home occupation permit; 29 DCMR 326.5 for failure to maintain health records for a child; 29 DCMR 301.7 for failure to post her child development facility license conspicuously on the facility premises; and 29 DCMR 320.4 for failure of a child development home caregiver to conduct food handling preparation and service in an adequate manner (the "Regulations"). The Government alleged that the violations occurred on June 25, 2007, at 3828 17th Place, N.E., (the "Property") and sought fines totaling $2,800.

On August 14, 2007, Respondent filed a timely answer entering pleas of Admit with Explanation to the charge of violating 29 DCMR 301.1, Deny to the charge of violating 29 DCMR 327.1, and Admit to the charges of violating 29 DCMR 326.5, 29 DCMR 301.7, and 29 DCMR 320.4.

As a result of Respondent's plea of Deny to the charge of violating 29 DCMR 327.1, a Case Management Order was entered on September 10, 2007 scheduling this matter initially for an evidentiary hearing on October 4, 2007. On October 4, 2007, the evidentiary hearing convened; however both parties requested a continuance, which was granted by Order entered October 10, 2007. The evidentiary hearing re-convened on November 14, 2007 and concluded on November 20, 2007.

The Government appeared, represented by Attorney Carmen Johnson. The Respondent appeared, along with her husband Edward Mills. The Government presented two witnesses in its case in chief, Hilda Goldberg and Denise McKoy. Respondent's witnesses were Joseph Sheehan and Julie Ann Martinez. A Spanish interpreter was provided for the Respondent.

After being advised of the three available pleas, Respondent sought to change one of her pleas from Admit with Explanation to Deny. I construed Respondent's request as a motion to amend her plea, which was granted over the Government's objections. Since the remaining three charges of violating 29 DCMR 326.5, 29 DCMR 301.7, and 29 DCMR 320.4 were admitted, the Government only proceeded on the two charges of allegedly violating 29 DCMR 301.1 and 29 DCMR 327.1, with pleas of Deny.

The record remained open for five days for the Respondent to provide proof by means of a canceled check that the previous infractions she admitted, which resulted in fines of $100 each,

and totaled $300 were paid. This administrative court did receive such documentation on November 21, 2007, which is attached to this Final Order.

Based on the entire record, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

Respondent was issued a license to operate a child development facility in the District on June 5, 2007 from 8 am until 6 pm. Petitioner's Exhibit "PX" 100. Respondent also holds a home occupation permit, which was issued on May 29, 2007. PX 101. The child development facility license issued by the Department of Health authorizes Respondent to have no more than four children. The home occupation permit issued by the Department of Consumer and Regulatory Affairs authorizes Respondent to have no more than five children. The Government began receiving calls from neighbors that observed the parents of Respondent's children in her care arriving earlier than 8 am and Respondent arriving around 8 am to let them in her facility.

On June 22, 2007, Ms. Denise McKoy, a supervisor in the Department of Licensing branch of the Department of Health arrived at Respondent's facility at 7:30 a.m. and observed one to two cars waiting outside of Respondent's Property until she arrived around 8:00 a.m. On June 25, 2007, Ms. Hilda Goldberg, who is an inspector who also speaks Spanish and English, and Ms. McKoy conducted an on-site inspection of Respondent's facility. They observed five children in the home. Respondent was not present at the time of their arrival, but had someone else supervising the children in her facility. Respondent spoke to Ms. McKoy and Ms. Goldberg by phone. Respondent was given a Statement of Deficiencies and Plan of Correction. PX 104. The Statement noted and both Ms. Goldberg and Ms. McKoy testified that they observed five

children in Respondent's home instead of four, which was the maximum capacity allowed under Respondent's license. Respondent was caring for a friend's child because of an emergency, i.e. the fifth child's mother had a Caesarean section birth on that date. One of the parents whose child is under Respondent's care, Julie Martinez was also present and observed the extra child. However, when Ms. Martinez arrived after June 25, 2007, the fifth child was no longer present at the facility.

At the time of the Government's on site inspection of Respondent's facility, Respondent had terminated her and her husband's lease on an apartment in Virginia. Respondent's husband is in the military. The couple had leased the apartment in Virginia because of her husband's military training. During the time period April through June 25, 2007, the couple was transitioning and moving to their primary residence at the Property. Mr. Joseph Sheehan testified credibly that Respondent admitted to the Government officials, Ms. McKoy and Ms. Goldberg, that her primary residence was at the Property, and that she only went to the Virginia apartment on occasion with her husband, due to her husband's military work and because the lease they had was ending. Mr. Sheehan helped the Edwards move in around May 2007. He did not move any furniture because the furniture was already there. Mr. Sheehan assisted Mr. Edwards move various pieces of personal property into the Property, including children's items. The couple has a one-year old daughter. Ms. Martinez also testified credibly that she had been inside Respondent's home several times and observed a fully furnished home both upstairs and downstairs.

III. Conclusions of Law

The Government has charged Respondent with violating 29 DCMR 301.1, which provides:

> The provisions of this Chapter shall not apply to the following:
>
> (a) Occasional babysitting in a babysitter's home for the children of one family;
>
> (b) Informal parent-supervised neighborhood play groups;
>
> (c) Care provided in places of worship during religious services;
>
> (d) Care by a related person, as defined in section 399 of this Chapter; and
>
> (e) Facilities operated by the federal government on federal government property; except that a private entity utilizing space in or on federal government property is not exempt unless federal law specifically exempts the Facility from District of Columbia regulatory authority.

Respondent was also charged with violating 29 DCMR 327.1, which states:

> Each Facility shall maintain, on the Facility premises, the following information for each employee:
>
> (a) The full name, gender, social security number, date of birth and home address;
>
> (b) Position title and job description;
>
> (c) Documentation and results of criminal and background history checks in accordance with this Chapter and with all other applicable federal and District of Columbia laws and rules;
>
> (d) A copy of the employee's resume, required degrees, certificates, transcripts, and letters of reference;
>
> (e) Verification of the employee's orientation to his/her duties and responsibilities and to the Facility's policies and procedures;
>
> (f) An ongoing record of continuing education;
>
> (g) First Aid and CPR Certification for children, as required;

(h) Date of appointment to, or withdrawal from, any position in the Facility;

(i) Reason for withdrawal from a position; and

(j) A copy of the employee's signature.

When comparing the Regulations cited above with the nature of infractions identified on the Notice of Infraction, neither corresponds with the other because the Government charged the Respondent using the old Regulations, which have since been repealed and replaced. Based on the entire record, the Government cannot succeed on any of these claims in this Notice of Infraction[1] because the Respondent was not placed on proper notice of the claims and afforded due process. Chapter 3 of Title 29 was repealed and replaced as of April 27, 2007. A Notice of Final Rulemaking was published in the District of Columbia Register on that date. 54 D.C. Reg. 3793. The Government charged Respondent with violations allegedly occurring on June 25, 2007, which was when the new Regulations were in effect. However the Government used the

[1] As stated previously, Respondent admitted to violating 29 DCMR 326.5 for failure to maintain health records for a child, 29 DCMR 301.7 for failure to post child development facility license conspicuously on the facility premises, and violating 29 DCMR 320.4 for failure of a child development home caregiver to conduct food handling preparation and service in an adequate manner. These provisions state the following:

> 326.5 Facility staff shall ensure that a child who is ill or suspected of being ill does not share any personal hygiene or grooming items.
>
> 301.7 [Does not exist under the new Regulations effective April 27, 2007.]
>
> 320.4 Civil fines and penalties may be imposed for any violation of the Act or of this Chapter, pursuant to the District of Columbia Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, effective October 5, 1985 (D.C. Law 6-42, D.C. Official Code §§ 2-1801.01 et seq.) (hereinafter "Civil Infractions Act"). Adjudication of all charged infractions shall be conducted pursuant to Titles I through III of the Civil Infractions Act. Hearings shall be conducted in accordance with section 318 of this Chapter.

old Regulations, which were no longer in effect, when identifying its charges in the Notice of Infraction.

As this court decided in *DCOP v. Santoboni* Case No. OP-I-T100002 (2006), a defect in a hearing notice is not necessarily fatal to an agency's claim against an adverse party. *Id.* An agency may proceed even in the face of a defective notice if the adverse party "was given adequate opportunity to prepare and present its position . . .and . . . no prejudice resulted from the originally deficient notice." *Watergate Improvement Associates v. Public Service Commission*, 326 A.2d 778, 786 (D.C. 1974). *See also Ridge v. Police & Firefighters Retirement and Relief Bd*., 511 A.2d 418, 424 (D.C. 1986). The dispositive question is not whether a citation is technically correct, but rather whether the procedure was fair. *Aloha Airlines, Inc. v. CAB*, 598 F.2d 250, 262 (D.C. Cir.1979). Fairness and due process require that the cited party have actual notice and a fair opportunity to litigate the charges. *Brock v. Dow Chemical* U.S.A., 801 F.2d 926 (7th Cir.1986).

This administrative court similarly concluded in *Santoboni, supra*, citing *DOH v. Smith*, No I-00-40049, Off. Adj. Hear, Lexis *37 at 6, Final Order (August 31, 2001):

> The Civil Infractions Act of 1985 and the Due Process Clause of the Fifth Amendment require that respondents be provided with full and fair notice of any charges brought against them and a reasonable opportunity to prepare a defense. *E.g.*, D.C. Code § 6-2711(b); The Government cannot rely (as it has here) on a catchall regulation with a general cross-reference to literally hundreds of regulations in DCMR Title 12. It must timely provide Respondent with fair notice of exactly which provisions of law form the underlying basis for the charge n7. Because the Government did not provide such notice, this charge must be dismissed. (citations omitted)

Though in this case the NOI described alleged violations that may be in the new Regulations, and sought $2,800 in fines, no fines are authorized under the cited Regulations effective on the date of the infraction. Only if the Respondent searched the labyrinth of Title 29,

Chapter 3 of the DCMR and then guessed correctly that the Government actually intended to charge her with violating specific provisions of Title 29, Chapter 3, could she have obtained notice of the specific violations the government intended to assert. *Santoboni, supra*. Under these circumstances, the Respondent did not have adequate notice or an opportunity to litigate the charges that the Government contends authorizes the imposition of $2,800 in fines. Both are essential to fairness and due process. *Brock, supra; Santoboni, supra.*

Normally, courts liberally grant amendments to administrative pleadings. *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985). Yet, a party that does not receive timely notice of an amendment is deprived of due process on the issues raised by the amendment. *Moore v. Moore*, 391 A.2d 762 (D.C. App. 1978). *Santoboni, supra.*

D.C. Official Code § 2-1802.02, read in conjunction with D.C. Official Code § 2-1802.01, permits a Respondent to answer a Notice of Infraction and thereby respond to the alleged violation of a specific law or regulation. In the event the Respondent answers the NOI with a plea of deny, he or she is entitled to a hearing on the Government's allegations. D.C. Official Code § 2-1802.03. Here, the Respondent filed various pleas of Deny to two charges and admit to the remaining three charges; however, she had no opportunity to file a plea or have a hearing as to the amendments that would be necessary to litigate this case pursuant to Title 29, Chapter 3 that were effective on the date of the infraction June 25, 2007.

Respondent is entitled to prior notice of a proposed, material amendment. *O'Halloren v. Carrar,* 129 F.R.D. 24 (D. Mass. 1990*); Brock, supra.* Since such an amendment would impose a significant penalty for charges having no fines, its materiality cannot seriously be doubted. A retroactive amendment at this stage in the proceedings, after two days of testimony and the

record has closed, would clearly deprive the Respondent of the opportunity to answer and defend the alleged violations, and thus violates both the Civil Infractions Act and due process.

Alternatively, these claims also fail to state a claim upon which relief can be granted because a revised schedule of fines has not yet been implemented under the new Regulations that became effective April 27, 2007.[2] This is necessary to link the new Regulations to authorized fines. The D.C. Court of Appeals has determined that pursuant to the Civil Infractions Act, this administrative court has jurisdiction only to impose civil fines, which have been prescribed. *Woolworth v. D.C. Board of Appeals and Review* 579 A.2d 713, 715-16 (D.C. 1990). In this case, no fines have been prescribed under the latest revised schedule of fines effective May 27, 2005, at 16 DCMR 3201, which preceded the new Regulations that became effective April 27, 2007. Therefore, this case will be dismissed in its entirety with prejudice. *Woolworth, supra.*

IV. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this 27th day of November, 2007:

ORDERED, that Respondent is **NOT LIABLE** for violating the Regulations as charged in the Notice of Infraction; and it is further

ORDERED, that this case and the underlying Notice of Infraction are **DISMISSED WITH PREJUDICE**; and it is further

ORDERED, that because Respondent has already paid $300, she is entitled to a refund in the amount of $300; and it is further

[2] Petitioner's counsel admitted the revised schedule of fines had not yet been implemented at the conclusion of closing arguments.

ORDERED, that the Clerk's Office shall submit a refund memorandum to the Office of the Chief Financial Officer calling for remittance of a check payable to Katia Zacapa-Mills at 3828 17th Place, N.E.; Washington, DC 20018, in the amount of $300 in accordance with applicable laws, regulations, and procedures for such refunds; and it is further

ORDERED, that the appeal rights of any party aggrieved by this Order are stated below.

November 27, 2007

_____/s/_____
Claudia Barber
Administrative Law Judge